

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1696

Cir. Ct. No. 2013SC380

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ROBERT E. HAMMERSLEY,

PLAINTIFF-APPELLANT,

V.

DEPARTMENT OF CORRECTIONS DENTAL UNIT,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dodge County:
STEVEN G. BAUER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Robert Hammersley appeals, pro se, the circuit court's order dismissing his small claims action and the order denying his motion

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

for reconsideration. Hammersley brought the action against the Department of Corrections and an individual alleged to be the head of the Department's dental unit. He alleged that he received inadequate dental care while in prison.

¶2 Hammersley fails in his appellate briefing to address the primary grounds for the circuit court's decision to dismiss his action. He also fails to otherwise make a developed argument showing any circuit court error. I affirm.

Background

¶3 Hammersley filed his small claims action pro se on March 11, 2013, naming two defendants: the "Department of Corrections Dental Unit" and "Head of Dental, Barb[a]ra DeLap." He attached to his complaint an undated notice of claim containing the underlying allegations.

¶4 Hammersley alleged that he was in prison from October 17, 2008, until January 1, 2013, and that, on January 29, 2013, after his release, he experienced a problem with dental work, including a bridge and an artificial tooth. Hammersley alleged that "[t]his type of deterioration does not happen overnight, and [a non-prison dentist] confirmed [that the bridge and artificial tooth were] healthy before I went under the care of the prison dentist." He claimed damages of \$10,000, including \$6,700 for the cost of the dental repair work.

¶5 The Department moved to dismiss Hammersley's complaint for failure to state a claim upon which relief may be granted. The Department argued that Hammersley's claim against the Department was barred by sovereign immunity. The Department argued that Hammersley's claim against DeLap was barred because Hammersley failed to comply with the notice of claim statute, WIS.

STAT. § 893.82, and because the allegations against DeLap were otherwise insufficient to show that she was liable.

¶6 Subject to certain exceptions, WIS. STAT. § 893.82(3) provides that “no civil action ... may be brought against any state officer, employee or agent ... unless within 120 days of the event causing the injury ... the claimant ... serves upon the attorney general written notice of a claim.” The statute imposes additional requirements, including that the notice be served by certified mail and that the notice include the “names of persons involved.” *See* § 893.82(3) and (5).

¶7 Hammersley did not dispute the Department’s sovereign immunity defense. He also did not dispute that he failed to comply with the notice of claim statute, nor did he assert any reason why the statute was inapplicable. He instead asserted that he sent his notice of claim to the attorney general’s office, albeit on April 1, 2013, after he filed his small claims action.

¶8 Hammersley also asserted that he did not have possession of, or access to, the names of the Department dental personnel who provided him with dental care. He filed a “demand” in the circuit court that the Department produce names and contact information for the personnel who provided his care.

¶9 The circuit court agreed with the Department that Hammersley’s claim against the Department was barred by sovereign immunity. The court also agreed with the Department that Hammersley’s claim against DeLap was barred because Hammersley failed to comply with the notice of claim statute and failed to sufficiently allege that DeLap was liable. The court therefore granted the Department’s motion and dismissed Hammersley’s action. In addition, the court granted the Department’s request for \$300 in statutory costs against Hammersley.

Discussion

¶10 I begin by pointing out that Hammersley’s limited appellate briefing does not constitute a developed argument. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (explaining reasons why argument may be considered undeveloped). A specific instance of this broader problem is that Hammersley fails to address the primary grounds for the circuit court’s decision dismissing his action. He fails to develop an argument regarding either sovereign immunity or his conceded failure to comply with the notice of claim statute. The Department, in contrast, argues that the circuit court should be affirmed on these grounds.

¶11 The lack of a developed argument in Hammersley’s briefing is by itself a sufficient reason for me to affirm the circuit court, and I do affirm on that basis. I could therefore end my analysis here. *See id.* (court of appeals need not consider undeveloped arguments); *see also United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to respond in reply brief to an argument made in respondent’s brief may be taken as a concession); *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 164-65, 582 N.W.2d 131 (Ct. App. 1998) (although court liberally construes a pro se litigant’s pleadings, that obligation does not include “creating an issue and making an argument for the litigant”).

¶12 I will, however, briefly address what I perceive to be Hammersley’s arguments. Those arguments do not persuade me that the circuit court erred.²

² To the extent that Hammersley makes assertions that I do not mention in the text, those assertions are too undeveloped to address.

¶13 Hammersley may be arguing that there is something unfair or problematic in the Department's refusal to produce employee names in response to the "demand" he filed. If that is Hammersley's argument, it is unclear how it could matter for purposes of sovereign immunity or the notice of claim statute. I recognize that Hammersley asserted in the circuit court that he had no access to the names of the individuals that provided his dental care, but he has not supplied any legal or factual basis to support the assertion that he lacked access.

¶14 Hammersley argues that he provided a sufficient "factual basis" for his claims. He refers to the doctrine of *res ipsa loquitur* and to the elements of a common law negligence claim. He makes various factual assertions explaining why he believes he received inadequate dental care. As I understand it, Hammersley means to argue that he sufficiently alleged that DeLap and other Department dental staff negligently caused his dental problems.

¶15 Even putting aside the fact that most of the factual assertions that Hammersley refers to in his appellate briefing are not contained in his complaint, his "factual basis" argument is still a losing one. What Hammersley may not understand is that, regardless of negligence and causation, he needed to address why his claims are not barred by sovereign immunity or the notice of claim statute. Sovereign immunity and the notice of claim statute, when applicable, present independent obstacles to claims that would otherwise be viable.³

³ In addition to referring to *res ipsa loquitur* and the elements of common law negligence, Hammersley cites 42 U.S.C. § 1983. He does not, however, suggest any reason why it might matter if his action is construed as including a claim under 42 U.S.C. § 1983. Similarly, Hammersley cites in passing to his Seventh Amendment right to a jury trial without explaining how the circuit court's decision could be viewed as a violation of that right. Dismissing a claim without a trial does not violate that right as long as there were proper grounds for dismissal.

¶16 Hammersley argues that the circuit court erred in assessing \$300 in costs, but Hammersley provides no legal authority on this topic. I therefore have no reason to conclude that the circuit court erred in assessing costs.

¶17 Finally, Hammersley requests that I remand to the circuit court so that he may request mediation under WIS. STAT. § 655.44. However, Hammersley suggests no reason why the availability of mediation depends on whether I remand. Moreover, Hammersley makes this request for the first time in his reply brief. We generally do not address arguments raised for the first time in a reply brief. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). I therefore consider this request no further.

Conclusion

¶18 In sum, for all of the reasons above, I affirm the circuit court's order dismissing Hammersley's small claims action and the order denying his motion for reconsideration.

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

